Supreme Court, U. S.
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No. 80-687

In the Supreme Court of the United States

OCTOBER TERM, 1980

KAY H. CLAFLIN,

Petitioner,

vs.

CHARLES E. CLAFLIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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QUESTION PRESENTED

Is the plaintiff denied due process of law under the Fourteenth Amendment to the United States Constitution, Section 1, when the Appellate Court, First District, State of Illinois, refused to grant the petitioner's petition to file briefs and refused to enforce a valid contract existing between the petitioner and the respondent regarding a property settlement in a divorce action, and has that decision also denied her constitutional rights under Article I, Section 10, impairing the obligations of contracts?

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The petitioner, Kay H. Claflin, by her attorney, Thomas P. Maroney, respectfuly prays that a writ of certiorari issue to review the order of the Supreme Court of the State of Illinois denying petitioner's petition for leave to appeal a decision of the Appellate Court, First District, State of Ilinois.

OPINION

The opinion of the Appellate Court, First District, State of Illinois, which the Supreme Court of Illinois refused to reverse, appears in the Appendix at p. App. 1.

JURISDICTION

The order denying the plaintiff's petition to appeal was entered on September 29, 1980. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION

Article I

Section 10. No state shall . . . pass any . . . Law impairing the Obligation of Contracts.

STATEMENT OF THE CASE

The Appellate Court stated in its Opinion, that plaintiff-appellee failed to file a brief in the Appellate Court. Petitioner states that the First Judicial Appellate Court has misapprehended the facts. The plaintiff-appellee's attorney in the First Judicial Appellate Court had given the attorney for the defendant-appellant at least three extensions of time to file his brief on behalf of his client. The plaintiff-appellee's husband-attorney, Robert R. Gavic, had agreed to file or cause to be filed in the First Judicial Appellate Court, timely briefs. Petitioner asumed he had done so. The first time petitioner knew her briefs were not filed was when James R. Donnelly, her attorney at the trial and appeal level, called her on February 7, 1980, and told her he had received a call from a member of the office of the Clerk of that Court informing him that briefs were not filed. On February 11, 1980, her Wisconsin attorney related to her that Attorney B. J. Hammarback of the Robert R. Gavic Law Office had stated to him that briefs had not been filed.

On February 24, 1980, petitioner filed with the First Judicial Appellate Court her Notice of Motion, Motion and Affidavit, requesting an extension of time for filing briefs, and on March 1, 1980 she received a letter from the Clerk of the First Judicial Appellate Court requiring her to file an appearance and pay a $15.00 fee, which she did on March 4, 1980.

That thereafter she caused to be printed her brief, and had the necessary copies filed with the Clerk of the First Judicial Appellate Court, and served the defendant-appellant's attorney on March 7, 1980, with the required copies. That said briefs filed with the First Judicial Appellate Court were returned to her on March 13, 1980, without a letter of explanation.

The First Judicial Appellate Court filed its decision on March 10, 1980 and petitioner received a copy on March 11, 1980.

The First Judicial Appellate Court did not decide the petitioner's motion to extend the time for filing briefs before it filed its decision, and did not mention in its opinion what disposition of the motion had been made.

There is nothing in the record to indicate that the First Judicial Appellate Court ever reviewed petitioner's affidavit for extension of time to file her brief in this case.

Petitioner was informed that her Motion for Rehearing was denied by the First Judicial Appellate Court on April 7, 1980, although to date she has not received a copy of said Order.

That before the hearing on August 22, 1977, in which Trial Judge Robert L. Hunter made the decision involved in this case, the Trial Court found the Agreement entered into between the parties to be ambiguous. See Judge Robert L. Hunter's Opinion, p. App. 9.

After listening to defendant-appellant Charles E. Claflin, his trial attorney, Russell M. Pelton, Jr., the plaintiff-appellee Kay H. Claflin, and her trial lawyer, M. J. Moriarty, the Trial Court stated in its Opinion:

> ". . . The court heard parol evidence to ascertain the intention of the parties at the time the agreement was executed of which little was salient and none dispositive. Thus the court is left with only the agreement itself to determine the interpretation of the property settlement." See p. App. 9.

This statement is tantamount to a finding that the contract is unambiguous. See *Halper* v. *Halper*, 57 Ill. App. 3d 588, 373 N.E.2d 598 (1978); also *Breuer* v. *Breuer*, 4 Ill. App. 3d 179, 280 N.E.2d 578 (1972).

The First Judicial Appellate Court overlooked the importance of paragraphs 8 and 10 of the Agreement entered into in the divorce case.

The First Judicial Appellate Court in its Decision stated:

> "... It would be indefensible and legally impossible to have a property settlement agreement where the welfare of three children is involved and make no provision for their support. See Weber v. Weber (1979), 77 Ill. App. 3d 383, 396 N.E.2d 43." See First Judicial Appellate Court's Decision, p. App. 1.

However, in the Agreement paragraph 8 provides as follows:

> "8. ... the wife shall assume and pay all of the obligations incurred on her behalf and on behalf of the children of the parties, except as expressly provided to the contrary herein, incurred after the date of this Agreement."

Paragraph 10 is the only paragraph in said Agreement that makes reference to payments being terminated in the event plaintiff-appellee be remarried, and applies only to the irrevocable life insurance trust, showing that paragraph 2 was not meant to terminate on remarriage or on the children reaching majority (because of lack of provision). This paragraph provides as follows:

> "10. ... In the event that the wife predeceases the husband or the wife is remarried at the time of the death of the husband and all of the children of the parties hereto have attained their majority, the proceeds of said policy shall be paid in equal shares to the then surviving children of the parties hereto. If at the time of the death of the husband, the wife has not yet remarried, the Trustee under the irrevocable life insurance trust shall pay to the wife an amount equal to the alimony and child support payments required

> to be paid at the time of the husband's demise. Said payment shall continue to be made to the wife until her death or until she remarries, whichever occurs first, at which time the then remaining balance of the Trust shall be distributed in equal shares to the then surviving children of the parties hereto." See Agreement in Decree for Divorce, pages 5 and 6.

The First Judicial Appellate Court misapprehended and was in error in considering plaintiff's testimony, that is her lack of testimony, and finding that there was a clear understanding that one-half of the payments were intended as maintenance or alimony, and the remaining one-half was child support. See First Judicial Appellate Court's Opinion, p. App. 1.

Assuming that this was the intention of the parties, the intention was made known to both the defendant-appellant and his attorney prior to the signing of the Agreement and should have been incorporated into the Agreement in order to avoid the very problems that the defendant-appellant is trying to raise now.

The Trial Court, referring to the testimony of the parties at the hearing, stated:

> ". . . since the evidence heard as to the intentions of the parties is conflicting the intentions of the parties at the time the instrument was executed is not discernable."

The United States Supreme Court should adhere to Judge Hunter's finding in this regard.

The First Judicial Appellate Court misapprehended in not adhering to the Trial Court's decision that the wife and children were perceived as one unit, for, among other things, tax purposes, because the plaintiff would be re-

quired to pay taxes on the gross amount, and because the defendant would be permitted to deduct said amounts. See 2 A.L.R.3d 596, 606. See Memorandum Opinion, p. App. 9.

The Trial Court stated in its Memorandum Opinion:

> "Nowhere are these payments to be reduced by the attainment of the children's majority. This, too, lends credence to the effect that the wife and children are to be construed as a unit and that payments are to continue regardless of the children's minority/majority."

The First Judicial Appellate Court erred in applying Ill. Rev. Stat. 1977, ch. 40 as the basis for terminating child support on majority and for the basis of terminating maintenance on remarriage, for the reasons that both of these items are specifically allowed for in the Agreement and the parties are bound by the language of the Agreement.

> "It is well settled that the normal rules for the construction of contracts are applicable in interpreting the provisions of a divorce decree. Halper v. Halper, 57 Ill. App. 3d 588, 373 N.E.2d 598 (1978)." See Judge Hunter's Memorandum Opinion, p. App. 9.

The First Judicial Appellate Court erred in canceling the Petitioner's support and maintenance payment as of April 17, 1978, for the reason that the Agreement is not ambiguous and it was the intent of the parties that the children and wife be treated as one unit and that the payments continue even after remarriage.

The Trial Court found that there were no changes in circumstances that justified modification of the order for support and maintenance payments and the First Judicial Appellate Court erred in making modifications.

The First Judicial Appellate Court erred in not requiring James R. Donnelly and Robert E. Gavic to formally withdraw as the plaintiff-appellee's attorneys, after having given plaintiff-appellee a formal notice of its intent to do so, so that plaintiff-appellee could have protected her interest in this case by filing briefs.

The plaintiff, Kay H. Claflin, was granted a decree of divorce from her husband, the defendant Charles E. Claflin, on January 20, 1969.

The divorce decree incorporated by reference, an Agreement of the parties in which they settled their property rights. This Agreement was incorporated in the Judgment and provided that the defendant pay to the plaintiff 50% of his net income as and for her allowance for support and maintenance and that of the children. The Agreement also provided for the issuance of an Insurance Trust Agreement. The Agreement for support and maintenance had no termination provisions. The life insurance Trust Agreement had a termination clause which stated that the life insurance proceeds were terminated in the event the plaintiff would remarry.

As a result of Post-Trial Motions brought by both parties, Judge Robert L. Hunter, on November 14, 1978, issued a Memorandum Opinion interpreting the provisions of the divorce decree and Agreement. The Opinion held that the payments specified in the divorce Agreement were not to be diminished by reason of each child attaining majority or temporary residence with the defendant.

Defendant filed a Motion to Vacate and Reconsider on January 4, 1979. Judge Hunter having retired, the motion was heard on February 7, 1979, by Judge Fleck sitting in his stead. Judge Fleck declined to review Judge Hunter's decision and denied the motion.

Defendant then appealed from Judge Hunter's Order of December 5, 1978 and from Judge Fleck's Order of February 7, 1979.

Plaintiff-appellee-petitioner herein, has already briefly argued the points relied on for reversal of the Opinion of the First Judicial Appellate Court. It is extremely important to litigants that motions made before the Appellate Court has filed its Opinion, should be decided. Due process of law would require that the plaintiff have notice of the fact that her attorneys did not file briefs in this case to afford her the opportunity to file briefs.

The plaintiff-appellee and the defendant-appellant negotiated extensively prior to signing the Agreement, which Agreement is not ambiguous and which Agreement was approved by Judge Fred G. Suria, Jr., the Trial Judge at the time of the divorce hearing, and which Agreement was upheld by Judge Robert L. Hunter and Judge Fleck, and which the First Judicial Appellate Court had no right to modify.

The Appellate Court in its decision, had no right to terminate the maintenance and child support because the petitioner and respondent entered into a valid contract and there is no authority in the Appellate Court's Decision for altering this contract.

In *Anderson* v. *Anderson,* 8 Wis. (2d) 133, (August Term, 1959), our Supreme Court stated as follows:

> "In the absence of any claim that the property-division provisions of the judgment were the result of the defendant's mistake, inadvertence, surprise, or excusable neglect, the jurisdiction of the trial court to review the same expired sixty days after the term at which such judgment was rendered. Sec. 269.46 (3), Stats. As pointed out in *Gray* v. *Gray*

(1942), 240 Wis. 285, 287, 3 N.W. (2d) 376, under the provisions of sec. 247.32, a provision in the judgment for alimony may be revised from time to time, but the division of estate is fixed for all time."

C.J.S. Second, Vol. 16A, § 345. — Executed Contracts, Sales and Conveyances, states as follows:

". . . The obligation of contract embodied in a lease is protected by constitutional provision against impairment by adverse legislation or judicial action, and the rights and obligations of the parties are fixed by their agreement of lease and no subsequent enactment should enlarge or diminish such rights or obligations.[72] Leases, however, are subject to valid exercises of the police[72.5] or war[72.10] powers." (footnotes omitted.)

See also, *Van Loon* v. *Van Loon,* 182 So., Supreme Court of Florida, p. 205.

Sistare v. *Sistare,* Vol. 218, United States Supreme Court, p. 1, pages 16-20, states:

"In considering the meaning of these provisions, it must be borne in mind that the settled rule in New York is that the courts of that state have only the jurisdiction over the subject of divorce, separation, and alimony conferred by statute, and that the authority to modify or amend a judgment awarding divorce and alimony must be found in the statute or it does not exist."

Griffin v. *Griffin,* 327 U.S. 220, at pages 233-234, states:

"As we said in Barber v. Barber, 323 U.S. 77, 82, 89 L ed 82, 85, 65 S Ct 137, 157 ALR 163, paraphrasing Sistare v. Sistare, 218 U.S. 1, 54 L ed 905, 30 S Ct 682, 28 LRA (NS) 1068, 20 Ann Cas 1061, where a decree for alimony is made the basis of an

action in another jurisdiction, 'every reasonable implication must be resorted to against the existence of' a power to modify or revoke installments of alimony already accrued 'in the absence of clear language manifesting an intention to confer it.' "

Estin v. *Estin,* 334 U.S. 541-554, at pages 547-549, states:

"We know of no source of power which would take the present case out of that category. The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an in personam jurisdiction over a person not before the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand."

CONCLUSION

We request that this Court grant a writ of certiorari to the Supreme Court of the State of Illinois for the reason that the petitioner herein has been denied her rights under the impairment of contract and the due process clauses of the U. S. Constitution.

Dated this 23 day of October, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX

FIRST DIVISION

March 10, 1980

79-735

KAY H. CLAFLIN,

Petitioner-Appellee,

v.

CHARLES E. CLAFLIN,

Respondent-Appellant.

Appeal from the Circuit Court of Cook County

Hon. Robert L. Hunter, Judge presiding.

Mr. Presiding Justice Goldberg delivered the opinion of the court:

This divorce litigation involves construction of a property settlement agreement concerning the payment to Kay H. Claflin (petitioner) of maintenance and also payment to Kay H. Claflin (petitioner) of maintenance and also support for three children by Chalres E. Claflin (respondent). The trial court found the agreement was ambiguous. After hearing testimony the trial court found the payments in question were to continue regardless of the fact that certain children had attained majority. Respondent appeals.

The petitioner-appellee has failed to file a brief in this court. We will decide the issues on the merits, as far as we are able under the record before us. See *First Capitol Mortgage Corp.* v. *Talandis Construction Corp.* (1976), 63 Ill. 2d 128, 133, 345 N.E.2d 493.

The initial issue, not discussed in respondent's brief, is whether the Illinois Marriage and Dissolution of Marriage Acts, effective October 1, 1977 (Ill. Rev. Stat. 1977, ch. 40, pars. 101 *et seq.*). applies here. We conclude this new legislation is effective here. No judgment has been entered on the subject matter of the within litigation at the time the new Act took effect. (See Ill. Rev. Stat. 1977, ch. 40, par. 801(b). Compare *West* v. *West* (1979), 76 Ill. 2d 226, 390 N.E.2d 880.) We will add that, in our opinion, the results hereinafter stated would be the same under the new Divorce Act or under the statute it supplanted.

On December 31, 1968, the parties, both represented by counsel, entered into a written property settlement agreement. Paragraph 2 of this agreement provided:

> "The husband shall pay to the wife fifty per cent (50%) of his net annual income derived from all sources as and for her allowance for support and maintenance and that of the children. For purposes of this Agreement, 'net annual income' shall be defined as gross annual income less deductions for payment of Federal Income Taxes and Social Security Taxes. Said sum shall be payable in fifty-two (52) equal weekly installments payable on the Friday of each week following the effective date of this Agreement."

This agreement also provided for payment to petitioner of 50 percent of the net amount of all bonuses which respondent might receive. It provided respondent was to submit to petitioner a verified copy of his individual tax return on or before April 15 each year. Credit was to be allowed respondent if his payments during the previous year exceeded the 50 percent mark and he was to make up any deficit. Minimum and maximum payments for any year were set at $10,000 and $22,500. On January 20, 1969, a judgment of divorce was entered which incorporated these provisions of the agreement.

It should be noted that on November 21, 1968, counsel for respondent wrote to counsel for petitioner and enclosed a preliminary draft of the property settlement agreement. This draft contained no mention of child support in its second paragraph. The draft was amended by the final agreement, above quoted, which added a specific provision that payments by respondent included child support.

The children of the parties are: Todd, born July 10, 1953, (21st birthday July 10, 1974); Bruce, born August 31, 1955, (21st birthday August 31, 1976); and Charles, born July 10, 1957, (21st birthday July 10, 1978).

On March 25, 1977, respondent filed a petition for an order clarifying or modifying his maintenance and child support obligations. The petition alleged the parties intended one-half of all payments by respondent were to constitute maintenance and one-sixth of all payments was for the support of each of the children. Respondent alleged that from time to time he had deducted, and petitioner had accepted, reduced payments as the children reached majority. Also respondent had reduced payments at times when the children were living with him and he supported them.

On April 13, 1977, respondent requested that petitioner admit respondent's attorney wrote to petitioner's attorney on May 22, 1974, and stated the understanding of the parties that the settlement agreement was prepared so as "to maximize tax benefits" and the understanding of the parties was that as each of the children attained majority support payments would be reduced by one sixth. Respondent was also asked to admit she was notified by her attorney of the contents of this letter shortly after its receipt and her attorney received no response from her concerning the contents. No response of any kind to this request was filed by petitioner. Ill. Rev. Stat. 1977, ch. 110A, par. 216 (c).

On June 8, 1977, petitioner filed an answer to respondent's petition. This answer categorically denied the petition concerning the alleged intention of the parties.

On August 25, 1978, respondent propounded written interrogatories to petitioner regarding the date of her remarriage, if any, and other information on this subject. It appears from the record that petitioner did in fact remarry on or about April 12, 1978. Her present husband is one of her attorneys of record in this appeal. There seems to be some doubt about the exact date of remarriage. An affidavit by petitioner shows the date of remarriage as April 17, 1978. We will use that date in this opinion. Respondent took the position that petitioner had wilfully concealed this fact from the court. On September 14, 1978, respondent filed a motion to hold petitioner in contempt for this reason.

On August 22, 1977, the trial court heard testimony on the theory that the property settlement agreement was ambiguous. In due course briefs were filed by both parties. On November 14, 1978, the able trial judge filed a memorandum opinion. The trial court found the agreement was ambiguous. The trial court correctly noted that the agreement does not state any specific percentage of respondent's obligation to be allocated to child support or the effect upon the obligation of respondent of emancipation of the children. The trial court concluded the payments in question were not to be diminished by reason of attainment of majority by the children or their temporary residence with respondent.

We note that at the time of the hearing the trial judge was apparently not aware of the remarriage of petitioner. That fact is not mentioned in his memorandum.

On November 17, 1978, the trial court entered an order which found petitioner had remarried on April 17, 1978.

The order provided all of the payments above specified in the property agreement be terminated retroactively as of April 17, 1978. Th trial court reserved for future consideration arrearages, if any, due petitioner prior to April 17, 1978; credit to respondent, if any, for payments made by him to petitioner after April 17, 1978; and the motion of respondent to hold petitioner in contempt. These reserved issues were continued generally. The order also provided respondent should furnish complete copies of his income tax returns for 1969 through 1977 with affidavits attesting to their correctness. However, on December 5, 1978, the trial court entered an order to the effect that payments to petitioner under the property settlement agreement are not diminished by reason of attainment of majority by the children or their temporary residence with the respondent. This appeal followed.

In this court, respondent concedes the agreement is ambiguous. Respondent contends the ruling of the trial judge is contrary to the evidence and to the law and the trial court erred in excluding evidence of petitioner's intent and refusing an offer of proof.

The gist of respondent's contention seems to be that he had the right unilaterally to reduce the payments due to petitioner as the children attained majority. It is correct as a general proposition that "the liability for support of a child generally continues during minority of the child . . . and ceases upon the child's attainment of the age of 18." (*Horzely* v. *Horzely* (1979), 71 Ill. App. 3d 542, 546, 390 N.E.2d 28.) The pertinent statute provides that provisions for the support of a child are terminated by emancipation of the child unless otherwise agreed in writing or in the judgment. (Ill. Rev. Stat. 1977, ch. 40, par. 510(c).) The same statute also provides payment of future maintenance is terminated on the remarriage of the party receiving maintenance. Ill. Rev. Stat. 1977, ch. 40, par 510(b).

In addition, it has been repeatedly held that a party may not unilaterally terminate child support payments when there is a change in circumstances. This conclusion is based upon the premise that modification of child support payments is a judicial function and past due installments for child support are a vested right of the recipient. *Jozwick* v. *Jozwick* (1979), 72 Ill. App. 3d 17, 20, 390 N.E.2d 488; *Dunsky* v. *Dunsky* (1976), 40 Ill. App. 3d 845, 848, 353 N.E.2d 371.

We are obliged to disagree with the learned trial judge in his interpretation of the agreement. There is evidence, as above pointed out, and petitioner, by her lack of testimony the point, has conceded, that a clear statement of the understanding between the parties and their attorneys was to the effect that half of the payments were intended as maintenance or alimony and the remaining one-half intended for child support. It would be indefensible and legally impossible to have a property settlement agreement where the welfare of three children is involved and make no provision for their support. See *Weber* v. *Weber* (1979), 77 Ill. App. 3d 383, 396 N.E.2d 43.

The agreement before us provides specifically that the payment was for support and maintenance "of the children". As above shown, these words were added to a preliminary draft of the agreement. There is no language in the agreement to the effect that the wife and not the husband would have the primary duty of supporting the children. In addition, we find in the record testimony by a member of the bar, who then acted as legal counsel for respondent, that the parties discussed the arrangement of 50 percent of the payment to be allocated to maintenance and 50 percent to child support and also child support would be reduced as the children reached majority. This understanding was reached prior to execution of the settlement agreement. Opposing counsel also testified on this

point but merely stated he had no specific recollection of such a conversation. Opposing counsel conceded he had received the letter from respondent's counsel dated May 24, 1974, described above in respondent's motion for admissions of fact.

We therefore construe the agreement to provide that the intent of the parties was 50 percent of the total payments by respondent would be considered alimony or maintenance for petitioner and the remaining 50 percent for child support with one-sixth of the total amount to abate as the children reached majority. However, this does not necessarily mean that we reach the result that the payments of child support ended automatically to the extent of one-sixth as each of the three children attained majority. The above citation of authority precludes this. See *Jozwick,* 72 Ill. App. 3d 17, 20.

We cannot agree with the contention of respondent that petitioner is estopped to claim continuation of the payments. Even if a letter of the kind above described was sent to petitioner, the record is bare of any response by her which is strong enough to evidence an equitable estoppel. In short, we find no agreement by petitioner to waive payment or to accept a lesser amount and no change of position by respondent. We find the doctrine of estoppel not applicable. *Jozwick,* 72 Ill. App. 3d 17, 21. See also *Ellingwood* v. *Ellingwood* (1975), 25 Ill. App. 3d 587, 591, 323 N.E.2d 571.

There remains various points of differences between these parties. Problems arise with reference to the computation of any possible arrearage by respondent in making payments of child support. But, counterbalancing problems also arise with reference to the claim of respondent that he has overpaid petitioner by virture of his lack of knowledge of the date of her remarriage. In our opin-

ion, the equities of these parties will best be served by bringing about an end to this litigation. The following will, in our opinion, balance the equities on both side of the ledger.

The order appealed from dated November 17, 1978, is reversed. The cause is remanded with directions for the entry of the following orders:

(1) All liability of the respondent for payment of maintenance and child support under the property settlement agreement between the parties is terminated as of April 17, 1978.

(2) Liability of rspondent for any prior arrearages which may have existed as of April 17, 1978, is hereby terminated.

(3) Petitioner shall not be liable to refund to respondent any possible overpayments which may have been made by respondent pursuant to the judgment for divorce.

(4) The motion of respondent to hold petitioner in contempt of court is denied.

For the reasons above stated, the order appealed from is thus reversed and the cause remanded for further proceedings consistent with the opinion of this court and the above directions.

Order reversed and cause remanded.

McGLOON and CAMPBELL, JJ., concur.

STATE OF ILLINOIS
COUNTY OF COOK—SS.

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
CHANCERY-DIVORCE DIVISION

No. 67 D 20539

In re the Marriage of: KAY H. CLAFLIN,

Petitioner

and

CHARLES E. CLAFLIN,

Respondent

MEMORANDUM OPINION

This Matter Coming On To Be Heard on Respondent's petition for entry of an order clarifying and/or modifying his alimony and child support obligations, and Petitioner's opposition to said petition; and the Court having reviewed the memoranda and cases cited therein and having heard arguments of counsel and testimony of witnesses and being fully advised in the premises, Finds:

That the parties to this proceeding were granted a divorce on January 20, 1969. Incorporated in the decree for divorce was a property settlement agreement executed by the parties. The portion of the agreement which this court has been called upon to construe is paragraph 2, which provides, in part:

> "2. The husband shall pay to the wife fifty per cent (50%) of his net annual income derived from all sources as and for her allowance for support and maintenance and that of the children . . .Notwithstanding

> any of the provisions of this paragraph to the contrary, the minimum amount which the husband shall pay to the wife in any calendar year shall be $10,000.00, and the maximum amount which the husband shall be obligated to pay to the wife during any calendar year shall be $22,500.00."

Respondent contends that at the time the agreement was executed, it was the intention of the parties that one-half (1/2) of the amount required by paragraph 2 was to be for the wife's maintenance and the other one-half (1/2) was to be equally divided for the support of their three minor children. Consequently, as each child reached majority, Respondent was under no obligation to support that emancipated child and might reduce his payments by one-sixth (1/6). Petitioner contends the entire amount is to be paid as her maintenance regardless of the minority/majority of the children. Because this Court found the provisions susceptible to two conflicting interpretations, it heard evidence regarding the intention of the parties at the time the agreement was executed.

Respondent attempted to establish that subsequent to the execution of the agreement, he temporarily reduced payments by one-sixth (1/6) each time one of the children lived with him and permanently reduced payments by the same amount each time one of the children reached majority. He asserts this pattern of conduct is indicative of the intent of the parties and by her acquiescence Petitioner impliedly agreed to Respondent's interpretation of the paragraph in question. Petitioner, however, denies acquiescence claiming she did not receive Respondent's tax returns and, therefore, was in no position to determine the correct amount due her. Furthermore, Petitioner understood the settlement agreement to be that payments would continue regardless of whether or not the children were still minors.

The property settlement agreement does not state any specific percentage amount for division of Respondent's obligation to be attributable to child support. Moreover, the agreement is silent as to whether Respondent's obligation is modifiable by the circumstances of the emancipation of the children. The court hear parol evidence to ascertain the intention of the parties at the time the agreement was executed of which little was salient and none dispositive. Thus the court is left with only the agreement itself to determine the interpretation of the property settlement.

It is well settled that the normal rules for the construction of contracts are applicable in interpreting the provisions of a divorce decree. *Halper* v. *Halper,* 57 Ill. App.3d 588, 373 N.E.2d 598 (1978). Thus the court is not limited to reviewing the single clause which presents the issue but may consider the entire instrument. *Breuer* v. *Breuer,* 4 Ill. App.3d 179, 280 N.E.2d 578 (1972). Moreover, in construing a contract, meaning and effect must be given to every part and no part should be rejected as surplusage since each provision is presumed to have been deliberately inserted for a purpose. *White* v. *White,* Ill. App. Ct., 1st Dist. July 5, 1978.

It is undisputed that the agreement entered into provided that Respondent's payment of fifty percent of his income was for Petitioner's allowance for support and maintenance and for that of the three, then minor, children. The agreement clearly shows that some portion of the payment is attributable to child support. However, there is no language in the agreement which expressly defines which portion of the Respondent's obligation is for child support or alimony, nor does the agreement indicate the construction or effects of the award after one or more of the children become ineligible to receive further benefits.

Because the agreement did not address either of these issues and since the evidence heard as to the intentions of the parties is conflicting the intentions of the parties at the time the instrument was executed is not discernible.

Thus, the issue becomes whether the court should modify a combined alimony and child support award, where one or more of the children has attained majority and the property settlement agreement is silent on the point.

Respondent may not claim under authority of *Snip* v. *Snip,* 35 Ill. App.2d 427, 183 N.E.2d 175 (1962) that he is entitled to reduce his amount of payments automatically as each child becomes of age. In *Storm* v. *Storm,* 9 Ill. App. 3d 1071, 293 N.E.2d 633 (1973), the same court declared:

> "... the decree in this case did not specify that a particular amount was for each child; it was for all four children collectively and cannot be held to be automatically reduced *pro rata* as each child reached his majority. The court can take 'judicial notice' that circumstances change, that because of inflation, among other things, a hearing on the ... amount might have resulted in either a reduction, an addition or in no change at all." p. 1074

Moreover, in *Doty* v. *Doty,* 45 Ill. App.3d 213, 215, 357 N.E. 2d 784 (1977), the court declared that: "A party directed to pay cannot modify support payments unilaterally and it is not for him to determine when or for what reasons he shall stop payments. (citations omitted)" Respondent's action in reducing his support payments temporarily by one-sixth each time one of his children lived with him and permanently as each child became of age was clearly illegal, absent any express language in the agreement to that effect and without court sanction.

The problem arising out of an unapportioned support award are not new to the courts. The practice is rationalized on the grounds that a wife and children are to be treated as a unit and, therefore, a reduction in the num-

ber of members of the unit who are eligible to receive benefits need not result in any reduction in the total amount of support received by other members of the unit. See 2 *A.L.R.*3d 596, 606.

If we examine the support agreement we find that paragraph 8 states in pertinent part: ". . . the wife shall assume and pay all of the obligations incurred on her behalf and on behalf of the children of the parties, . . ." This language seems to indicate that Petitioner and the children were perceived at the time as one unit. Furthermore, evidence adduced at the hearing indicates that the agreement was drawn in such a way as to minimize the tax consequences to Respondent, i.e. not specifying how the award was to be apportioned, since child support payments are not deductible while alimony is. As a result Petitioner bears the tax burden of herself and the children as a unit.

More importantly, paragraph 10 of the agreement, discussing a life insurance policy taken out by Respondent, states in pertinent part:

> "If at the time of the death of the husband, the wife has not yet remarried, the Trustee under the irrevocable life insurance trust shall pay to the wife an amount equal to the alimony and child support payments required to be paid at the time of the husband's demise. Said payment shall continue to be made to the wife until her death or until she remarried, whichever occurs first, . . ."

Nowhere are these payments to be reduced by the attainment of the children's majority. This, too, lends credence to the effect that the wife and children are to be construed as a unit and that payments are to continue regardless of the children's minority/majority.

It must be kept in mind that the court may alter the allowance of alimony and child support as appears reasonable and proper on application. (Ill. Rev. Stat. 1973, ch. 40, par. 19). Although the Illinois Marriage and Dissolution

of Marriage Act does not specify the conditions on which maintenance may be terminated or modified, it has been construed to allow modification of an award upon a showing of substantial change in the circumstances of the parties. See *Lane* v. *Lane,* 35 Ill. App.3d 276, 340 N.E.2d 705 (1975). It must be shown modification is equitable. *Lane* v. *Lane,* supra.

Emancipation is but one factor in determining whether circumstances have so changed as to warrant modification of an award. *Cahill* v. *Cahill,* 316 Ill. App. 324, 45 N.E.2d 69 (1942). In the instant case, Respondent has proferred no evidence on which the court might justify modification of the support award. Where there is no evidence of how and to what extent the emancipation of the children might decrease Petitioner's needs it would be error to modify the support award. *Baker* v. *Baker,* 53 Ill. App.3d 186 (1977).

IT IS THE OPINION OF THIS COURT that the payments specified by paragraph 2 of the property settlement agreement were not to be diminished by reason of the children's attainment of majority or the temporary residence with Respondent.

The attorney for the Petitioner is directed to prepare an order consistent with this opinion.

ROBERT L. HUNTER, Judge
Divorce Division, Circuit Court
of Cook County, Illinois

Dated: November 14, 1978

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September 29, 1980

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No. 53345 — Kay H. Claflin, petitioner, vs. Charles E. Claflin, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
Clell L. Woods
Clerk of the Supreme Court